#1004

ARBITRATION OPINION AND AWARD

In the Matter of the Arbitration

between

FEDERAL AVIATION ADMINISTRATION

and

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION
Case No. WP-08-77405-[redacted]

ISSUE:

Termination of [redacted] (AWOL)

Impartial Arbitrator

Philip Tamoush
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Hearing Held	Record Closed	Award Issued
April 14-15. 2008	December 13, 2008	January 17, 2009

[redacted]

Appearances

For the Agency: Richard N. Fossier, Agency Representative
15000 Aviation Blvd
Lawndale, CA 90261

For the Union: Kevin Sills, Esq.
National Air Traffic Controllers Association
1325 Massachusetts Ave NW
Washington, DC 25005

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ISSUES

The parties stipulated to the following statement of the issue on the merits of the termination of [redacted]

Whether the removal of [redacted] was for such cause as to promote the efficiency of the service; if not, what should the remedy be? (Transcript, Part I, page 9)

The Agency also raised a jurisdictional issue, which the parties agreed could be stated essentially as follows:

Does the Arbitrator have the authority to make a decision on the subject case, inasmuch as it was jurisdictionally defective in that the Union filed the grievance under a contract that was no longer in effect. (Transcript, Part I, pages 11 & 12)

With regard to the jurisdictional issue, Counsel for both parties agreed to present evidence on it on the morning of April 14, after which they agreed to provide evidence on the merits of the termination case on April 14 and 15, 2008. The parties proceeded in that manner, and initially filed post-hearing briefs with regard to the threshold issue on June 30, 2008.

The parties later argued the merits of the appeal of the termination matter in opening statements. The Agency filed a written brief, while the Union did not file a brief on the merits, and the matter was considered submitted by the undersigned on December 13, 2008. Both days of the hearing were taken by a reporter and transcribed. All of the aforementioned written documents, including exhibits provided by the parties, are incorporated herein by reference.

WRITTEN CONTRACT LANGUAGE

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I. AGREEMENT - **Article 10 – Disciplinary/Adverse Actions**

> **Section 3.** Disciplinary/adverse actions shall not be taken against an employee except for such cause as will promote the good of the service. Any action taken by the Agency shall e supported by a preponderance of the evidence.

BACKGROUND AND SUMMARY OF FACTS

This case involves the appeal of the of the termination of [redacted] Air Traffic Controller, from his position at [redacted] airport on January 28, 2008. The incident precipitating the ultimate termination occurred in the [redacted] control tower on or about November 11, 2006. Since that date and the final termination date, the parties engaged in extensive correspondence meetings and settlement discussions over the Grievant's medical condition, AWOL issues, contractual jurisdictional issues, and other matters, without successful resolution of any of these. Accordingly, the parties selected the undersigned to resolve both jurisdictional and meritorious issues dealing with [redacted] grievance (Joint Exhibit 6) and his termination (Joint Exhibit 3).

More specifically, the Grievant was terminated for being AWOL. While there are several documents relative to proposals to place the Grievant on AWOL, refuse to return him to work, and finally terminate him, the final precipitating document is the letter of December 10, 2007 (JX-3) to [redacted] from [redacted] Air Traffic Manager at [redacted] Air Traffic Control Tower, from [redacted] actual classification Air Traffic Control Specialist. The letter, in pertinent part, is as follows:

> This is notice that I propose to remove you from your position of Air Traffic Control Specialist at [redacted] ATCT and from the Federal Aviation Administration (FAA), no earlier than 30 calendar days from the date you receive this notice for such cause as will promote the efficiency of the service. The reason is as follows:
>
> **REASON:** Unauthorized absence of more than five consecutive workdays
>
> Specification: From March 16, 2007 through November 6, 2007, you were absent, without authority, from [redacted] ATCT, [redacted] CA, your assigned duty station; you were required to be at your duty station during that period. Your absence was not authorized and it was properly denied due to the unacceptable medical documentation you provided. 23
>
> **BACKGROUND:** In a letter dated September 27, 2007, I notified you of my proposal to remove you from your position as an Air Traffic Control Specialist at [redacted] ATCT for: Unavailability for duty for your position of record. This letter documented the numerous requests made by the Agency for you to provide administratively acceptable medical documentation to support your claimed illness [redacted]. As noted in my September 27 proposal letter to you, due to your repeated and continuing failure to provide this required medical documentation, you were placed in an Absent

Without Leave (AWOL) status on March 16, 2007, and remained in an AWOL status through November 6, 2007.

You were provided the opportunity to reply to my September 27th proposal within 15 days. At your request, the reply period was extended, and the last day you had to reply was November 9, 2007. On November 7, 2007, you reported to the facility and stated that you were ready to return to work, and at that time, you gave me a note from your doctor that stated you were available to return to work with no restrictions. At that time, I placed you on excused absence (administrative leave) status due to management concerns. You will remain in that leave status during the proposal/reply period.

I have decided to rescind the September 27th proposal noted above. You were notified of my decision in a letter I sent you dated November 28, 2007. In lieu of that, I have decided to issue this current proposal letter.

On November 28, 2006, you were issued a memorandum requesting administratively acceptable medical documentation with regard to your reported illness. You failed to provide adequate medical documentation that addressed your medical condition.

On December 11, 2006, you were given a memorandum asking you again to provide administratively acceptable documentation to support your claimed illness. Again, you did not provide adequate medical documentation.

On February 22, 2007, you were given a letter allowing you until March 15, 2007 to provide the requested administratively acceptable medical documentation to support your absence from duty on an intermittent basis as of December 7, 2006 and absence from duty on a permanent basis since December 12, 2006. This same letter acknowledged your February 9, 2007, request for administrative duties at another facility as an accommodation request and notified you of your responsibility to submit supporting medical evidence to facilitate the processing of the request.

On March 16, 2007, in response to your repeated and continuing failure to provide the medical documentation required to justify your continued absence from duty, you were placed in an Absence Without Leave (AWOL) status.

On June 6, 2007, a letter was sent to you informing you that continued absence from your safety related duties and failure to return by June 25, 2007, or provide administratively acceptable medical documentation would leave me no choice but to initiate separation procedures.

In choosing this proposed action, I have taken into consideration the following:

a. Regular attendance at your job as a condition of employment. Lengthy absences disrupt planned job assignments and place an unfair burden on other employees.
b. Your services as Air Traffic Control Specialist are needed on a full-time regular basis.
c. You have been an FAA employee since January 26, 1990 and a controller at this facility since June 6, 1996.
d. You received a conduct and discipline briefing on August 11, 2004 and an employee responsibilities briefing on October 13, 2004. Additionally, you were repeatedly briefed by FLM [redacted] on Standards of Conduct, HRMP ER 4.1, FAPM 2635 including Appendix 1, Table of Penalties. 24
e. This action is consistent with the Table of Penalties in FAA's Human Resources Operating Instructions, dated August 14, 2000, for a first offense.
f. I see no mitigating circumstances, at this time.

(JX-3, Letter to [redacted] from [redacted], December 10, 2007)

The above-quoted letter covers virtually all of the critical elements of the time span from November 2006 through actually January 2008. On January 22, 2008, [redacted] issued the final action letter which included, in relevant part,:

> On January 10, 2008, you and your NATCA Representative, [redacted] made an oral presentation in response to the proposal. I have carefully reviewed the information you presented in this oral response, and your written response, which I also received on January 10, 2008. After thorough consideration of the substance of your responses, as well as the proposal letter and supporting information, I find that the evidence supports the proposed action and it is my decision that you be removed effective January 28, 2008. (JX-5, Letter to [redacted] from [redacted], of January 22, 2008)

The termination action, effective January 28, was followed up almost immediately by [redacted] NATCA Representative, with a request for expedited arbitration, including [redacted] grievance documents (which the undersigned finds are contained in JE-4, a letter, with attachments, from [redacted] to [redacted] of some 60 pages which contains virtually all of the relevant documentation between [redacted] and FAA management representatives during relevant portions of the period between November 2006 and December 2007).

As indicated in Mr. Fossier's post-hearing brief and initial opening statement on the merits, "...There is not much argument as to the factual situation." (Post-hearing brief, page 3) Sometime in November 2006, the Agency repaired and subsequently replaced the air conditioning system at [redacted] Air Traffic Control Tower. Apparently, as a result of the repair, the Grievant and two other coworkers became ill and/or were overcome by fumes, even though Grievant [redacted] was not in the facility when the air conditioning unit was first turned on after its repair/replacement. [redacted] shortly thereafter, on or about November 28, was asked to submit "administratively acceptable medical documentation" by his supervisor, [redacted]. [redacted] letter (and other substantive Agency documents) requested: 25

> 1. The history of your medical conditions, including references to findings from previous examinations, treatment, and responses to treatment;
>
> 2. Clinical findings from the most recent medical evaluation;
>
> 3. Diagnosis, including the current clinical status;

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1. The history of your medical conditions, including references to findings from previous examinations, treatment, and responses to treatment;

2. Clinical findings from the most recent medical evaluation;

3. Diagnosis, including the current clinical status;

4. Prognosis, including plans for future treatment and an estimate of the expected date of full or partial recovery;

5. An explanation of the impact of your medical condition on overall health and activities, including the basis for any conclusions that restrictions or accommodations are or are not warranted, and where they are warranted;

6. An explanation of the medical basis for any conclusion which indicates the likelihood that you are or are not expected to suffer sudden or subtle incapacitation by carrying out, with or without accommodation, the tasks and duties of your position; and

7. A narrative explanation of the medical basis for any conclusion that your medical condition has or has not become static or well stabilized and the likelihood that you may experience sudden or subtle incapacitation as a result of your medical condition.

8. Medical documentation for each day of absence since November 12, 2006 and A Form SF71 has been provided for you to fill out, sign and return. (JX-4, pages 1-13, 14)

The above 1–8 request became the following a–g request at various times during this whole process:

a. The history of your medical conditions, including references to findings from previous examinations, treatment and responses to treatment;

b. Clinical findings from the most recent medical evaluation, and in the case of psychiatric evaluation or psychological assessment, the findings of a mental status examination and the results of psychological tests;

c. Diagnosis, including the current clinical status;

d. Prognosis, including plans for future treatment and an estimate of the expected date of full or partial recovery;

e. An explanation of the impact of your medical condition on overall health and activities, including the basis for any conclusions that restrictions or accommodations are or are not warranted, and where they are warranted, an explanation of their therapeutic or risk avoiding value;

f. An explanation of the medical basis for any conclusion which indicates the likelihood that you are or are not expected to suffer sudden or subtle incapacitation by carrying out, with or without accommodation, the tasks and duties of your position; and 27

g. A narrative explanation of the medical basis for any conclusion that your medical condition has or has not become static or well stabilized and the likelihood that you may experience sudden or subtle incapacitation as a result of your medical condition. (JX-4, pages 1-21, 22)

[redacted] had already received return-to-work permits from his medical examiners at a [redacted] medical facility (JX-4, pages 1-36, 37, 38, 39, 40, etc.). In addition, during this whole period in question, the Grievant had provided a variety of medical documents from his own doctors. Additionally, his Union offered to finance testing at the [redacted] Tower to assure that [redacted] could return to work safely. As well, at various times during the period in question, the Grievant did request modified work restrictions, Workers' Compensation benefits, transfer to other facilities, etc. At the same time, Management representatives continued to request that [redacted] conform and respond to their "a–g" requests for "acceptable medical documentation." The matter became a "standoff" of sorts. Both parties were continuously in communication with one another, but the Grievant was put on AWOL status at least from March 16 through November 6, 2007 because of this confused situation.

As indicated in Joint Exhibit 3, above quoted, [redacted] was provided a final opportunity to reply to Management's request for medical documentation by November 9, 2007. On November 7 he did report to work; stated he was ready to return to work, with a note from his doctor indicating he would have no restrictions. Significantly, Management placed [redacted] on paid administrative leave, which apparently continued through his termination effective January 28, 2008.

The parties notwithstanding all of their discussion and written documentation, continued at loggerheads. The matter proceeded to arbitration.

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CONTENTIONS OF THE PARTIES

Because of intervening activities and a lack of controversy over the facts of this case, the undersigned will not belabor this Opinion by relating extensive discussion on the parties' arguments. Suffice to write:

Contentions of the Agency

With regard to jurisdiction, the Agency's arguments are well known and have been presented in many cases throughout the country. That is, whether or not the 2006 "Agreement" implemented by the FAA unilaterally when it could not reach closure over negotiations for a successor contract in 2006 applied to the instant grievance (JX-1, white book), or whether the 2003 contract negotiated by the parties (JX-2, green book) applied. The FAA believes the 2006 document applies, both because it had reached impasse with the Union in the 2006 negotiations and, pursuant to Federal statute, had the right to implement its final offer after appropriate impasse procedures had already been invoked and followed. The Agency argues that the grievance of [redacted] was not arbitrable and that the issue on its merits should be dismissed without further consideration.

On its merits, the Agency's position is straightforward. That is, the Grievant was absent without authorized leave from March till November 2007, and as such arbitral and legal precedent supports the rationale for termination. The Grievant has failed and refused to provide "adequate medical documentation" as repeatedly requested. Thus, the grievance should be denied, even if the grievance is found to be appropriate on its merits.

Contentions of the Union

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The Union contends that the 2006 "Agreement" is invalid since the Agency has refused to follow all of the appropriate impasse procedures. Accordingly, only the 2003 Agreement, under which [redacted] grievance was filed, is appropriate to be considered. Irrespective of that issue, the

grievance should be considered on its merits since essentially the grievance procedure continues even after the termination of the 2003 Agreement.

With regard to the merits of the case, the Union's argument is essentially that the Grievant and the Union have followed all appropriate steps to meet whatever legal and contractual requirements exist with regard to his return to work. The Grievant has provided adequate medical documentation so that Management can proceed in evaluating his condition, whether for modified work assignment, regular work assignment, or other action. The grievance should be sustained and [redacted] returned to work with full back pay, benefits, interest on lost earnings, attorney fees, etc.

DISCUSSION, FINDINGS AND CONCLUSIONS

With regard to the jurisdictional issue, on July 14, 2008, the undersigned did communicate in writing his decision on the question of jurisdictional arbitrability, to wit:

The issue, on its merits, is arbitrable. The parties are ordered to proceed to the question of whether the removal of [redacted] was for cause as to promote the efficiency of the service (letter from the Arbitrator to Counsel for the parties of July 14, 2008). The undersigned, in his finding on the issue of arbitrability, adopts Arbitrator Elizabeth Neumeier's decisions on the same issue from her May 2, 2008 decision in the matter of Grievant [redacted] (Grievance No. (NC) NE-08-338-BED-AT). The undersigned has appended Ms. Neumeier's well-reasoned discussion and decision, and adopts it as his. The arguments made by the parties are essentially the same and the decision, although not universally accepted by every arbitrator who has considered the issue, is sound and appropriate. 30

Parenthetically, with regard to the threshold issue, it appears from the record produced by the Agency in a follow-up written letter of October 30, 2008, from Counsel Fossier to the undersigned, copy to the Union, that District Judge Rosemary M. Collyer's decision on October 23, 2008 disposes of the issue more definitely. Judge Collyer dismissed NATCA's suit against the FSIP, relative to

impasse proceedings in this case. Her decision (Civil Action No. 08-481 (RNC)) disposes of the issue for the time being. Unless further appeals occur, the 2006 contract is the controlling document.

Regardless of the Court's opinion described above, the undersigned would indicate that the grievance in this case is not procedurally defective because of the effect of the 2006 contract prevailing over the 2003 Agreement. The parties are referred to the classic and definitive book *How Arbitration Works* by El Kouri & El Kouri, 5th Ed., pages 154–162, which has extensive discussion on why grievances, especially those dealing with employee discipline, challenging the implementation of the Agency standards of conduct in Table of Penalties, can and should continue in effect. They should be processed as legitimate grievances for the reasons enunciated there. Here, the grievance is not challenging a specific contractual section of the Agreement, with the exception of the efficiency of the service, and that language is found in both Agreements.

With regard to the merits, the parties, for whatever reason, perhaps merely the complexity and quantity of grievances being processed, could not reach the logical conclusion that they should have in this case. [redacted] has responded sufficiently to the requests of Management, to the extent that he was returned to work on paid leave on November 7, 2007. He continued on paid leave until the Agency again decided (perhaps for the fourth time) to terminate him from his work. The Agency cannot have it both ways. It has continued for over a year to procrastinate with the condition of the Grievant, who not only is a long-term (from the 1980's actually), satisfactory employee, who has a significant educational and training background in air engineering and flying, to justify his retention. [redacted] doctors reasonably requested that the Agency do the sort of testing that it finally did conduct. It has worked apparently effectively with another employee, [redacted] to permit her to medically retire, rather than terminating her services for being AWOL. There does not seem to be any hint that the Agency believes that either [redacted] or [redacted] were attempting some kind of "flim-flam" or deceit to beat the Agency out of permitting them to retire or return to work.

The Agency was not legally or contractually required to return [redacted] to work as it did on November 7. It placed him on paid leave so that, apparently, they could work with him to achieve agreement on whether he was medically qualified to return to some sort of work position, or to be voluntarily retired. The undersigned believes it is now the function of this arbitration dispute, relying on the massive quantities of papers filed by both parties, to continue the actions that should have occurred in January 2008 and following. Accordingly, and in summary of his conclusions on this matter, the undersigned believes that [redacted] and the Agency must be required to deal with one another in a responsible manner, based on equity, including a clear and specific analysis of the Douglas factors so that it can be definitively determined whether [redacted] should be returned to some sort of active duty. The undersigned believes that while an argument could be made to continue [redacted] in pay status from January 28, 2008, it would be a real form of "unjust enrichment" to permit him to receive full pay while expeditiously working to resolve this matter. Rather, it will cause him and the Agency to move rapidly to resolve the issue of his work/retirement status if the following were to occur:

1. Continue [redacted] on approved <u>unpaid</u> pay status as an Air Traffic Control Specialist, from the effective date of his latest termination, but still being carried on the FAA rolls as an employee of the Agency.
2. The parties will be ordered to move expeditiously to deal with one another in a reasonable manner to determine whether [redacted] can be returned to work under "reasonable accommodation" Workers' Compensation, or some form of active or modified work status in the [redacted] or another nearby facility. Such activity must occur within 90 days, or [redacted] might forfeit his rights to work. 32
3. The "acceptable medical documentation" of "1-8" and/or "A-G will be ordered to be rescinded as a requirement. Rather, the Grievant shall be examined by Agency physicians,

pursuant to the typical flight status physicals required of him and by his own physician, pursuant to its understanding of his job requirements.

4. The parties shall meet forthwith to discuss the results of such testing.
5. The parties shall consider medical retirement, regular retirement, or any other lawful status that can be considered to affect a mutually satisfactory result.
6. The undersigned will retain jurisdiction to finalize any order, respond to requests for clarification or implementation, or otherwise deal with any issues brought up in writing by the Union or [redacted] (in the event that the Union no longer is representing [redacted]).
7. It is the intent of the award in this matter that [redacted] be returned to work as an Air Traffic Control Specialist or in any other capacity administratively possible.

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AWARD

1. The grievance filed by the Grievant, [redacted] and his Union, is arbitrable.
2. The removal of [redacted] was not for such cause as to promote the efficiency of the service.
3. The Agency is ordered to place [redacted] on unpaid absence with approval from January 28, 2008, on an ongoing basis.
4. With reference to number 2 above, the Agency is ordered to provide [redacted] with whatever benefits any other employee on unpaid approved absence would be entitled from January 28, 2008.
5. The parties are ordered to implement the summary conclusions found on page 12 of the opinion in this decision in order to reach a mutually acceptable conclusion to both parties.
6. The undersigned does retain jurisdiction in this matter to finalize any order, respond to requests for clarification or implementation by either party (in writing), or to otherwise accommodate the needs of the parties and arrive at a mutually satisfactory resolution of the matter. Either party must respond within 90 days to the undersigned if it wants the arbitrator to consider the case's status (e.g., to return [redacted] to work at full pay, consider some other status, etc.)

Respectfully submitted,

Philip Tamoush

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Philip Tamoush
Impartial Arbitrator

January 17, 2009
Torrance, California